No. 3521

United States
Circuit Court of Appeals
For the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiff in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Southern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

Names and Addresses of Counsel.

Messrs. TUCKER & HYLAND, Attorneys for Plaintiffs in Error,

307 Lowman Building, Seattle, Washington.

Messrs. RIGG & VENABLES, Attorneys for Plaintiff in Error,

Yakima, Washington.

Messrs. PRESTON, THORGRIMSON & TURNER, Attorneys for Defendants in Error,

911 Lowman Building, Seattle, Washington.

CHARLES H. HARTGE, Esq., Attorney for Defendants in Error,

521 Central Building, Seattle, Washington.

[1*]

In the Superior Court of the State of Washington, in and for King County,

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Complaint.

CHARLES H. HARTGE, 521 Central Building, Seattle, Washington, Attorney for Plaintiffs.

Come now Etta Eichelbarger and Stanley Eichel-

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*Page-number appearing at foot of page of original certified Transcript of Record.

barger, her husband, by their attorney, Charles H. Hartge, and for cause of action against defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, allege:

I.

That said defendant Al. G. Barnes Show Company is a foreign corporation.

II.

That plaintiffs are now and have been at all times herein mentioned husband and wife.

III.

That the defendants on the twenty-first day of June, 1917, and for long prior thereto, and at all times subsequent, have been and now are, the owners and operators of a large circus, and on the twenty-first day of June, 1917, the said defendants gave a large show of said circus at the town of Toppenish, in the State of Washington, and for the purpose of inducing the public to attend said show, extensively advertised the same and invited the public to attend upon the said show, and the plaintiff, Etta Eichelbarger, on said day, in the [2] evening, attracted by the said advertisements, went to the said show, and paid admission to the defendants and was admitted into the said show, and was directed by an attendant in the employ of the defendants to take a seat in a certain row of seats temporarily constructed under canvas, one situated above another, and all accessible only by walking from the lower seat up across the said seats to the upper tiers of the said row of seats, and in pursuance of said direction said plaintiff, Etta Eichelbarger, stepped upon the said

seats and went up near the top of the said row or bank of seats for the purpose of choosing a seat, and in so doing said plaintiff, Etta Eichelbarger, stepped upon a seat which was in the said row or bank, which said seat when stepped upon by the said plaintiff, Etta Eichelbarger, broke and precipitated the said plaintiff, Etta Eichelbarger, down through the said row or bank of seats on to the ground beneath, a distance of about ten feet; that the said seat was weak and defective and the said accident was caused solely by the negligence of the defendants in placing in the said row or bank of seats the said defective and weak seat and in directing the said plaintiff, Etta Eichelbarger, as aforesaid, to seek a seat in the said row or bank, and for that purpose to step upon the said seats; that in all respects the said plaintiff, Etta Eichelbarger, used due care and was wholly free from any fault or negligence, and the said accident was caused solely by the said negligence of the defendants aforesaid; that by such injury plaintiff, Etta Eichelbarger, is compelled to use her right foot in an unnatural position, thereby throwing a greater burden on her left foot and ankle, thereby straining the same in use and weakening the same and causing her pain and discomfort, and causing callous places on the inside of said left foot; that during much of the time of each day she suffers pain in said injured right foot and ankle, thereby rendering her nervous and unfit for continuous work of any kind, and causing her to suffer a nervous pain in the back of the neck and head, and in her hip, rendering her, many times at night, unable to sleep well; that said right

foot, by reason of said injury, is always cold; that all of said conditions have existed at all times since said injury, are permanent and will continue for the rest of her life; that for several years prior to said injury, in addition to performing her household duties, plaintiff, Etta Eichelbarger, worked one-half or more of her time at day-work doing housework, and was able, and would at all times since and now be able but for such injury, to earn the going rate of wages for such work, which at the time of said injury was two dollars per day for eight hours, and which at all times since January 1st, 1918, has been at least three dollars per day for eight hours, and at all times since January 1st, 1919, four dollars per day for eight hours; that she is by such injury wholly incapacitated for such work or any other continuous or active work and her earning power thereby reduced to not over one-fourth of her former earning power. [3]

IV.

That by the said fall the plaintiff Etta Eichelbarger's right ankle was dislocated, and her ankle was fractured with a Potts fracture, and the ligaments and muscles of her right leg, ankle and foot torn loose, strained, mangled and injured, and the said plaintiff, Etta Eichelbarger, was caused great pain, suffering and distress, and was confined to her bed and chair [4] for a period of six weeks, and thereafter was compelled to go on crutches until about the first day of November, 1917, and ever since said last-mentioned date has been compelled in walking to use a cane, and said plaintiff's ankle has become greatly enlarged, and the same and her foot

distorted and deformed and her right leg shortened, and the muscles of said leg wasted, and the said plaintiff, Etta Eichelbarger, has been permanently maimed, deformed and injured, and plaintiff, Etta Eichelbarger, will never fully recover from the said injury, but will always be lame and partially disabled from active pursuits.

IV.

That plaintiff, Etta Eichelbarger, at the time of said injury was of the age of thirty-three years and in good bodily health and strength, and would be in the same condition at the present time except for the said injury; that plaintiff, Etta Eichelbarger, is a housewife living in the City of Seattle, said county and state, with her husband, the said plaintiff, Stanley Eichelbarger, and the children of the plaintiffs, now of the age of ten and eleven years, respectively.

V.

That the plaintiffs have been damaged by reason of the premises in the sum of TEN THOUSAND DOLLARS ($10,000.00).

WHEREFORE, plaintiffs pray for judgment against the said defendants and each of them in the sum of Ten Thousand Dollars ($10,000.00), and for their costs and disbursements herein.

CHARLES H. HARTGE,
Attorney for Plaintiffs. [5]

State of Washington,
County of King,—ss.

Etta Eichelbarger, being first duly sworn, on oath says: That she is one of the plaintiffs above named; that she has read the foregoing complaint, knows

the contents thereof, and believes the same to be true.

ETTA EICHELBARGER.

Subscribed and sworn to before me this 29th day of May, 1919.

CHARLES H. HARTGE,

Notary Public in and for the State of Washington, residing at Seattle, in said State.

Filed in Clerk's Office June 18, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Endorsed]: Complaint. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the Superior Court of the State of Washington, in and for King County,

No.——

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Summons.

The State of Washington, To the said AL. G. Barnes Show Company, a Corporation, and Al. G. Barnes, Defendants:

You and each of you are hereby summoned and re-

quired to appear within twenty (20) days after the service of this summons, exclusive of the day of service, answer the complaint and serve a copy of your answer upon the undersigned attorney for plaintiffs at his office below stated, and defend the above-entitled action in the Superior Court of the State of Washington in and for King County, in which said court this action is brought, and in case of your failure so to do, judgment will be rendered against you according to the demand of the complaint which will be filed in the above-entitled court, and copy of which is herewith served upon you.

Plaintiffs hereby designate said King County as the place of trial.

CHARLES H. HARTGE,
Attorney for Plaintiffs.

Office and Postoffice Address:
521 Central Building,
Seattle, King County,
Washington.

Received May 31, 1919.

JOHN STRINGER,
Sheriff, King County, Wash.

[Indorsed]: Summons. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [7]

In the Superior Court of the State of Washington for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Petition for Removal to the United States District Court for the Western District of Washington, Northern Division.

To the Honorable BOYD J. TALLMAN, Presiding Judge, and Associate Judges of the Superior Court of the State of Washington for King County:

Comes now the defendants and respectfully petition this Honorable Court for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division, and, for cause of removal, state:

I.

That this action was commenced by the service of summons upon defendants on the 29th day of May, 1919.

II.

That plaintiffs herein are now and have been at all times herein mentioned, husband and wife; that

said plaintiffs are both citizens and residents of the State of Washington, residing at Seattle, King County, and were such citizens and residents and so resided at the date of the commencement of this action, and ever since have been such citizens and residents and so resided.

III.

That at the time of the commencement of this action, and ever since and now the defendant Al. G. Barnes Show Company, was, has been and still is a corporation organized and existing under and by virtue of the laws of the State of Colorado and duly [8] authorized to transact business in the State of Washington. That at all times since the commencement of this action, it was and still is a resident and citizen of the State of Colorado, having its principal place of business at Denver, in said state. That the defendant herein, Al. G. Barnes, is a citizen and resident of the State of California, residing in Venice, Los Angeles County, in said state, and was such citizen and resident and so resided at the date of the commencement of this action, and ever since has been such citizen and resident and so resided.

IV.

That this is a controversy between citizens and residents of different states, to wit, in that plaintiffs are both of them citizens and residents of the State of Washington, and the defendants, Al. G. Barnes Show Company and Al. G. Barnes are citizens and residents of the State of Colorado, and California respectively, and that the controversy between plaintiffs and the defendants involves an amount in favor

of plaintiffs and against the defendants of more than $3,000.00; and the matter in controversy between the plaintiffs and each of them on the one hand and the defendant on the other hand exceeds, exclusive of interest and costs, the sum of $3,000.00, to wit, that said plaintiffs pray for a judgment for $10,000.00.

V.

That the time has not elapsed when defendant, under the laws of the State of Washington and the rules of the Superior Court of the State of Washington for King County, is required to answer or plead to the complaint of the plaintiffs.

VI.

That the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, herewith present their bond for the approval of this Honorable Court with D. H. Moss & Co. and C. A. Philbrick as sureties in the sum of $500.00, duly conditioned as required by law that defendants will enter in the United States [9] District Court for the Western District of Washington, Northern Division, within thirty days from the date of this petition, a certified copy of the record in this suit, and conditioned to pay all costs that may be awarded by said United States District Court for the Western District of Washington, Northern Division, in said District Court should hold that this suit is wrongfully or improperly removed thereto.

WHEREFORE, your petitioners humbly pray that an order may be entered transferring and removing this cause from the Superior Court of the State of Washington for the County of King to the United

States District Court for the Western District of Washington, Northern Division, that being the District where such suit is pending.

TUCKER & HYLAND,
Attorneys for the Defendants-Petitioners.

State of Washington,
County of King,—ss.

Wilmon Tucker, being first duly sworn, on oath deposes and says:

That he is one of the attorneys for the defendants, the petitioners herein, making the foregoing petition and asking for the removal of this cause to the United States District Court for the Western District of Washington, Northern Division; that he has read the said petition, knows the contents thereof, and believes the same to be true; that he is duly authorized and qualified as attorney for said defendants to sign this petition for the removal of this said cause; that he makes this affidavit for and on behalf of said defendants, for the reason that said defendants are not citizens of this state and are not present here.

WILMON TUCKER.

Subscribed and sworn to before me this 17th day of June, 1919.

ANNE C. MARTIN, [10]
Notary Public in and for the State of Wash., Residing at Seattle.

Service of within petition this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorney for Pltf.

Filed in Clerk's Office June 17, 1919. Percy F. Thomas, Clerk. By W. T. Hatt, Deputy.

[Indorsed]: Petition for Removal to the United State District Court for the Western District of Washington, Northern Division. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the Superior Court of the State of Washington, for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Bond on Removal.

KNOW ALL MEN BY THESE PRESENTS: That the Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, as principals, and D. H. Moss and C. A. Philbrick, as sureties, are held and firmly bound unto the plaintiffs, Etta Eichelbarger and Stanley Eichelbarger, her husband, in the full and penal sum of Five Hundred ($500.00) Dollars, to the payment of which well and truly to be made, they and each of them, bind themselves, their successors, heirs, executors and administrators jointly, severally and

firmly by these presents.

Signed and sealed this 17th day of June, 1919.

THE CONDITION of the foregoing obligation is such that WHEREAS, the Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, have petitioned the Honorable Superior Court of the State of Washington for the County of King for the removal of this cause from said Superior Court to the United States District Court for the Western District of Washington, Northern Division;

NOW, THEREFORE, if said Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, shall, within thirty days from the date of filing of said petition for the removal of this cause enter in the said United States District Court for the Western District of Washington, Northern Division, a certified copy of the [12] record of this suit and shall pay all costs that shall be awarded by said United States District Court for said Western District of Washington if said District Court shall hold that this suit was wrongfully and improperly removed thereto, then this obligation to be null and void; otherwise to remain in full force and virtue.

AL. G. BARNES SHOW COMPANY,
By TUCKER & HYLAND,
Its Attorneys,
AL. G. BARNES,
By TUCKER & HYLAND,
His Attorneys,
Principals.
D. H. MOSS,
Surety.
C. A. PHILBRICK,
Surety.

State of Washington,
County of King,—ss.

D. H. Moss and C. A. Philbrick, being each first duly sworn, on their oaths depose and say, each for himself:

That he is a vice-president of the First National Bank of Seattle, Washington; that he is not a sheriff, clerk of court, attorney at law, or any other officer of any court; that he is worth at least the sum of $500.00 in separate, individual property, exclusive of property exempt from execution.

D. H. MOSS.
C. A. PHILBRICK.

Subscribed and sworn to before me this 17th day of June, 1919.

[Seal] W. H. BERRY,
Notary Public in and for the State of Washington, Residing at Seattle.

The foregoing bond is hereby this day approved in form, penalty and as to the sufficiency of the sureties.

Done in open court this 20th day of June, 1919.

BOYD J. TALLMAN. [13]

Service of within bond this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorneys for Pltf.

Filed in Clerk's Office, June 20, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Indorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

In the Superior Court of the State of Washington, for King County.

No. 136,226.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order for Removal.

This cause coming on for hearing upon the application of the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, for an order removing this cause from the Superior Court of the State of Washington for King County to the United States District Court for the Western District of Washington, Northern Division; and it appearing to the Court that this is a controversy between citizens and residents of different States, and that the matter in controversy in this suit exceeds, exclusive of interest and costs, the sum of $3,000.00, and the time for the filing of the petition by the defendant for such removal and the time provided by the laws of the State of Washington and the rules of this court, has not expired in which said defendant is required to

answer or plead to the complaint of plaintiffs; and it further appearing to the Court that a bond in due and proper form as required by law, with sufficient penalty and with sufficient sureties, is duly presented with said petition and filed in this cause; and it further appearing that, prior to the filing of said petition and bond, notice was given to plaintiffs in writing of said petition and bond;

It is, therefore, here and now ORDERED, ADJUDGED AND [15] DECREED that this cause be, and it hereby is, removed from this court to the United States District Court for the Western District of Washington, Northern Division, and the clerk of this court is hereby directed to prepare and certify a copy of the record in this suit under his hand and seal upon the payment of the proper fees therefor and deliver the said certified copy of said record to said defendants, or their attorneys.

Done in open court this 20th day of June, 1919.

BOYD J. TALLMAN,
Judge.

Service of within order for removal this 17th day of June, 1919, and receipt of a copy thereof admitted.

CHARLES H. HARTGE,
Attorneys for Pltf.

Filed in Clerk's Office, June 20, 1919. Percy F. Thomas, Clerk. By A. N. Olson, Deputy.

[Indorsed]: Order for Removal. Filed in the United States District Court, Western District of Washington, Northern Division. June 26, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Stipulation and Order Amending Bill of Complaint.

The Court having heretofore, upon motion of defendants, ordered the words, "and the children of the plaintiffs, now of the age of ten and eleven years respectively," stricken from the fourth (4th) paragraph of the complaint, it is now stipulated and an order may be made accordingly that the plaintiffs shall have leave to make said amendment without rewriting said complaint by drawing a pen through the said words.

CHARLES H. HARTGE, and
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs,
TUCKER & HYLAND,
Attorneys for Defendants.

ORDER.

Upon the foregoing stipulation it is ORDERED that plaintiffs have leave to amend the complaint to conform to the order of this Court heretofore made

striking the words mentioned in said stipulation from the fourth (4th) paragraph of the complaint by drawing a pen through the words so to be stricken [17] and without the necessity of filing an amended complaint.

Done in open court this 20th day of October, 1919.

EDWARD F. CUSHMAN,
Judge.

[Indorsed]: Stipulation. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 20, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Answer.

COME NOW the defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, and for answer to the complaint of the plaintiffs, on file herein, admits, denies and alleges as follows:

I.

Defendants admit the allegations contained in paragraph "I" of said complaint.

II.

Touching the matter of the facts set forth in paragraph "II" thereof, defendants allege that they have no knowledge or information sufficient to form a belief as to the truth thereof, and therefore deny the same.

III.

Touching the matter of the facts set forth in paragraph "III" of said complaint, defendants admit that on June 21st, 1917, for a long time prior thereto, and at all times subsequent, they have been and now are the owners and operators of a large circus, and on the 21st day of June, 1917, said defendants gave a large show of said circus at the town of Toppenish, in the State of Washington. As to whether said Etta Eichelbarger on said day, went to said show, paid admission to said defendants, and was admitted [19] into said show, these defendants have no knowledge or information sufficient to form a belief and therefore deny the same and the whole thereof, and these defendants deny each and every other allegation, matter and fact in said paragraph contained.

IV.

Referring to paragraph "IV" of said complaint, defendants deny each and every allegation contained therein.

V.

Referring to paragraph "V" of said complaint, erroneously numbered "IV," defendants deny each

and every fact alleged and contained therein.

VI.

Referring to paragraph "VI" of said complaint, erroneously numbered "V," defendants deny each and every fact alleged and contained therein.

FOR A FURTHER, SEPARATE AND AFFIRMATIVE DEFENSE these defendants allege that if said plaintiff Etta Eichelbarger was injured on June 21st, it was through her own negligence, carelessness and want of care and caution, and not through any want of care or lack of duty or failure in the performance of any obligation or duty on the part of said defendants toward said plaintiff.

WHEREFORE, defendants, having fully answered said complaint, pray that same may be dismissed and that they have and recover their costs and disbursements herein expended.

RIGG & VENABLES.
TUCKER & HYLAND.

State of Washington,
County of King,—ss.

Wilmon Tucker, being first duly sworn, upon [20] his oath deposes and says that he is one of the attorneys for the defendants herein; that he has read the within and foregoing answer, knows the contents thereof and believes the same to be true; that he makes this verification for the reason that the defendant Al G. Barnes Show Company is a corporation organized outside of the State of Washington, and none of its officers or agents are within the State of Washington, and that the defendant Al. G. Barnes is a nonresident of the State of Washington.

WILMON TUCKER.

Subscribed and sworn to before me this 21st day of October, 1919.

FRED. ELVIDGE,

Notary Public in and for the State of Washington, Residing at Seattle.

Service of within answer this 22d day of Oct., 1919, and receipt of a copy thereof, admitted.

PRESTON, THORGRIMSON & TURNER
and
CHARLES H. HARTGE,
Attorneys for Pltfs.

[Indorsed]: Answer. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 23, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Reply.

Come now the plaintiffs, by their attorneys, Charles

H. Hartge and Preston, Thorgrimson & Turner, and deny each and every allegation contained in that part of defendants' answer alleged as a further, separate and affirmative defense.

WHEREFORE, plaintiffs pray as in their complaint.

CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs.

State of Washington,
County of King,—ss.

Etta Eichelbarger, being first duly sworn, upon oath deposes and says that she is one of the plaintiffs above named; that she has read the within and foregoing reply, knows [22] the contents thereof and believes the same to be true.

ETTA EICHELBARGER.

Subscribed and sworn to before me this 24th day of October, 1919.

[Notarial Seal] CHARLES H. HARTGE,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of the within Reply by delivery of a copy to the undersigned is hereby acknowledged this 25th day of October, 1919.

TUCKER & HYLAND,
Attorneys for Defendants.

[Indorsed]: Reply. Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 25, 1919. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy, [23]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Motion for New Trial.

Come now the defendants, by their attorney, Tucker & Hyland and Rigg & Venables, and respectfully move the Court for a new trial in the above-entitled cause on the following grounds and reasons:

I.

Irregularity in the proceedings of the court, and jury and plaintiffs and abuse of discretion by which the defendants were prevented from having a fair trial.

II.

Misconduct of the plaintiffs and of the jury.

III.

Accident and surprise by which the defendants with ordinary prudence could not have guarded against.

IV.

Newly discovered evidence, material for the defendants, which they could not with reasonable dili-

gence have discovered and produced at the trial.

V.

Excessive damages appearing to have been given [24] under the influence of passion or prejudice.

VI.

Error in the assessment of the amount of recovery, the same being too large.

VII.

Insufficiency of the evidence to justify the verdict, and that the same is against the law.

VIII.

Error in law occurring at the trial and excepted to at the time by the defendant.

This motion is based upon the files and records herein.

TUCKER & HYLAND and
RIGG & VENABLES,
Attorneys for the Defendants.

Service of within motion this 31st day of Jan., 1920, and receipt of a copy thereof, admitted.

PRESTON, THORGRIMSON & TURNER,
and
CHARLES H. HARTGE,
Attorneys for Pltfs.

[Indorsed]: Motion for New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 31, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [25]

In the District Court of the United States for the Western District, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Overruling Motion for New Trial.

The above-entitled cause having come on this day on motion of defendants for a new trial and the said motion having been submitted to the Court by stipulation without argument,—

It is now by the Court, being duly advised in the premises, ordered that the said motion for a new trial be and the same is hereby overruled, to which defendants duly excepted in open court and said exception is now noted and allowed.

Done in open court this fifth day of April, 1920.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Order Overruling Motion for a New Trial. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States District Court, Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Excerpt from Appearance Docket.

May 3, 1920. Lodged Bill of Exceptions.
Law Docket—Volume 8, page 62. [27.

In the District Court of the United States for the Western District of Washington.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Verdict.

We, the jury in the above-entitled cause, find for the plaintiffs and assess their damages at the sum of

Five Thousand and 00/100 Dollars ($5,000.00).

JOHN F. ADAMS,
Foreman.

[Indorsed]: Verdict. Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 30, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [28]

In the District Court of the United States for the Western District, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Judgment.

Now, on this 5th day of April, 1920, this cause came on for hearing upon the motion of Charles H. Hartge and Preston, Thorgrimson & Turner, attorneys for plaintiffs, to enter judgment on the verdict heretofore rendered by the jury in this action, and it appearing to the Court that heretofore this cause came on duly to be tried before this Court and a jury having been duly impaneled and sworn and evidence having been introduced on the part of the plaintiffs and the plaintiffs and defendants having rested and

the said cause duly submitted to the jury after argument by counsel for plaintiffs and defendants and the instructions of the Court, the said jury having thereupon retired to consider their verdict and having, on the 30th day of January, 1920, on the same day, returned into court a verdict in favor of the plaintiffs against the defendants in the sum of Five Thousand Dollars ($5,000.00).

Now, therefore, in consideration of the premises it is by the Court ordered and adjudged and these presents do hereby order and adjudge that plaintiffs, Etta Eichelbarger and Stanley Eichelbarger, her husband, do have and recover of [29] and from the defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes the sum of Five Thousand Dollars ($5,000.00), with interest thereon at the rate of six per cent (6%) per annum from the 30th day of January, 1920, and the costs of this action taxed in the sum of $69.60.

To all of which the defendants, being present by Wilmon Tucker, Esq., one of their attorneys, duly excepted, which exception was noted and allowed. Defendants are now allowed thirty days from this date within which to file and serve their bill of exceptions.

Done in open court this 5th day of April, 1920.

EDWARD E. CUSHMAN,
Judge.

O. K. as to form.

TUCKER & HYLAND and
RIGG & VENABLE,
Attys. for Defts.

[Indorsed]: Judgment. Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 5, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and A. G. BARNES,

Defendants.

Bill of Exceptions and Order Allowing Same.

BE IT REMEMBERED that on the 29th day of January, 1920, the above-entitled cause came on duly and regularly for trial in the above-entitled court before the Honorable Edward E. Cushman, one of the Judges thereof, sitting with a jury.

The plaintiffs were represented by Mr. Charles H. Hartge and Mr. L. T. Turner as their attorneys, and the defendants were represented by Mr. Wilmon Tucker and Mr. H. B. Rigg as their attorneys.

The jury having been duly and regularly empaneled and sworn to try the issues in the cause and counsel for the plaintiff having made his opening statement, the following evidence was thereupon offered:

Testimony of Etta Eichelbarger, on Her Own Behalf.

ETTA EICHELBARGER, called as a witness on her own behalf, being first duly sworn, testified as follows:

My name is Etta Eichelbarger. I am the wife of Stanley Eichelbarger, the other plaintiff. I was married 13 years ago and am now thirty-five years of age. In the month of June, 1917, I was thirty-three years old. At that date I was living at Buena, Washington, and went to Toppenish to see the circus. I went with my brother-in-law, Fred Eichelbarger, and Mr. and Mrs. Frank Hardy. Fred Eichelbarger bought the tickets for all of us. When we went in one row of seats was pretty well crowded, but there were some seats at the top that were not filled, and we thought we would go up along the side of the seats that were pretty well filled up, and I said, "I can't walk that narrow path," [31] and the attendant said, "Come down here and go up." We went down to a row of seats that were empty and then went up across the seats to the top. All the rest were ahead of me except Fred Eichelbarger. The seat board broke and I fell through. The seats were not very wide; were one above the other on kind of cleats. There was no aisle or other place to go up except across the seats, and they ran around the circus on each side of the reserved seats. There was no one sitting on the board that broke; they were sitting pretty close on the other side of the board. At the time I stepped on the seat that broke, there was no one else on it. I went right down through and

(Testimony of Etta Eichelbarger.)

the piece of board came down with me. The show people tore down the seats and took me out to a little tent that was fitted up as a hospital, and my foot was bound up and some liniment poured on it by a man they called "Doc." I don't know his name. Then the showmen carried me into one of the lower seats and gave me a box to put my foot on and I stayed for the circus. About ten o'clock he looked at the foot again, and then they took me in an automobile and took me to the Toppenish Hotel. Then a man came in that was introduced as Dr. Bice. He examined the foot and said that it was broken; Dr. Bice then set the foot and I went home the next day in my brother in law's automobile. On getting home I went to bed and remained there about six weeks; it was eight weeks before I was out of the house. During part of the last two weeks I was in bed. Dr. Bice put splints and then a wire cast on my foot. After I got up I was obliged to wear crutches for some time. Dr. Bice came from time to time during the first six weeks and twice after that. The last time he saw my foot was about the first week in October. Dr. Bice gave me directions how to handle it, and what to do with it , and I followed Dr. Bice's directions. I used crutches until after Thanksgiving, 1917, and during all that time I used care in putting my weight on my foot. From Thanksgiving until March of the following year I used, and it was necessary to use, a crutch and a cane; since March, 1918, I have used the cane that I now have with me. I suffer a great deal with the injury, particularly in the heel. [32]

(Testimony of Etta Eichelbarger.)

Starting in with the time of my injury at first the suffering occasioned thereby was worse on the inside of the foot, then it changed around and got in the toes and then back in the heel. Now, when I lie down it hurts mostly in the hip. I am not able to step squarely upon the foot; as a result, the other foot is very sore and very much calloused; I am not able to use the other foot in a natural way on account of having to stand in an unnatural way on the injured foot. Since the injury I have been very nervous and have had terrible headaches and suffered some from sleeplessness. I have had a great deal of pain in the back of my head and neck. I don't think I use my foot any better than I did when I first got around, only I am more used to it. After I am on it a few minutes it pains me, as soon as I get my shoes on and move around. Prior to the injury I worked about five days a week, earning 25¢ an hour, which was the going wages for that kind oif work; since that time I can work for three hours a day, possibly two days a week. After I have worked about three hours, I am unable to stand any longer. The only work I have done or can do since the injury is taking care of children and ironing; something I can sit down to, and can get very little of that kind of work, "and that kind of work only pays 30 cents an hour; the going wage for day work is 50 cents.

(Witness then removed her shoe and illustrated the manner in which she was obliged to walk.)

"Prior to the time I was injured my health had always been very good and my ankles, legs and feet were both in good condition and I walked naturally."

(Testimony of Etta Eichelbarger.)

Cross-examination.

"My husband works for the Archer Blower and Pipe Company. We had started on a trip east by automobile and stopped to visit. We had been in Buena two weeks, intending to leave on Monday and I got hurt Thursday. We were not going into the reserve seat section, but into the general admission section. We were not being conducted to a seat by an usher, but he showed us up the seats. He just stepped back and said, 'Pass on up to those seats.' There were people seated in front close to the ring, and we were going [33] to the upper seats behind them, stepping up the seats which were made of loose plank, lying on bents in the nature of steps, one above the other. The board broke about the length of my cane from the bent. The board that broke was about 10 or 12 feet from the ground. There was nothing on the ground where I fell. First I thought I just had a strained ankle. I got to the room in the hotel about eleven o'clock, or a little later at night. I had never had an injury to that ankle or foot before. From the hotel I went to Frank Hardy's house, which is where I remained for eight weeks. Then we lived in a tent at Buena until October, 1917, when we came back to Seattle, where we still live. I did not put any weight on my foot until after the cast was removed. I weigh about 195 now, and weighed about the same at the time of the accident; 190 is my normal weight. The callouses on the bottom of my other foot were not there at the time of the accident. I might have been in an automobile prior to the 21st of

(Testimony of Etta Eichelbarger.)

August, but I was not on a motorcycle. Since that time I have been with my husband on a motorcycle.

Redirect Examination.

The only automobile I went out in was my brother in law's and I did not go in that until after the cast was removed, and then I had my crutch and put no weight on my ankle and did not injure or hurt my foot in any manner. The first time that I think I went on a motorcycle was the last of September, but got no fall and did not hurt myself. I never put my foot down so as to throw my weight on it or injure it in any way. I have never wrenched or sprained it since the injury."

Testimony of J. H. Snively, for Plaintiff.

J. H. SNIVELY, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows:

"I am a physician and surgeon; have been since 1905. [34] (Defense admits qualifications of witness.) I specialize in X-Ray work. On June 13th, 1918, I too two X-Rays of the plaintiff's foot, which correctly represent the condition of her foot as it then was. (X-Ray plates were then produced by witness and marked Plaintiffs' Exhibits 1 and 2.)

The WITNESS.—Exhibit 1 shows two views of the plaintiff's foot; the one to the right looking at the ankle from the front and the one to the left looking at the ankle from the side. This picture then is looking at the ankle from the front, and you will notice the large bone comes down, and at the lower part of

(Testimony of J. H. Snively.)

the large bone we have a little pointed process there and just at the base of that process you will notice a little crack running through, and that is where the lower end of the large bone is broken off. And then if you will follow the small bone down the leg you will notice that right opposite the articulation or the joint that the small bone takes an acute angle there and branches off to the side. That small bone should have run straight on down to about where my pencil is, and then up in there. That bone being broken off on the inside of the foot, the large bone and the small bone of the leg being broken off at the level of the joint permits the foot to be thrown outward. Now, looking at the other, the side view of the ankle, you will notice again the large bone coming down, and right at the bottom here this little piece broken off and then looking at the small bone you will notice right at the lower part the rounded head on it there showing a callous, a new bone that has been formed—I might add that has grown on there solid now—but you can see where the old bone was and distinguish it from the new bone that is thrown out there to heal it; so we have the ankle now solid in that position. Then coming back to the first one looking at the front view of the leg, if you will draw an imaginary line right through the center of the shaft of the large bone straight on down, you will notice that the foot is away off to the side of that imaginary line. Now, the weight of the [35] body is borne on that large bone and it should come right directly in the center of that large bone and be transferred to the

(Testimony of J. H. Snively.)

bone of the foot through its center, while here you will find that the weight-bearing surface comes away over to the side of the foot, permitting the foot to flop outward when the weight comes on it, so that it is not a weight-bearing surface any more. The weight comes on the side and the foot rolls outward and causes pain and still greater tendencies to deformity. We have here (witness refers to Exhibit 2) a normal ankle. If you will just put that up there I can explain that a little better perhaps.

Q. I hand you Plaintiffs' Exhibit 2—so marked—it is not introduced in evidence yet; if you will take that and explain to the jury, show the jury, the difference between that ankle as it now is and the normal ankle.

Mr. TUCKER.—Whose ankle is that?

The WITNESS.—This is another party. This is a normal ankle such as we ordinarily find.

Mr. TUCKER.—I will object to that as being incompetent and immaterial, making a comparison between this ankle and the ankle of somebody else that is normal. I don't think that would be admissible. It is incompetent.

The COURT.—Your objection being that it is not the other ankle of the plaintiff,

Mr. TUCKER.—It is an ankle of some other person.

The COURT.—Well, the jury will take that into consideration. It is simply being used by way of illustration to show how the bones are normally situated. Of course, it would not be of the same advantage to

(Testimony of J. H. Snively.)

you as if it had been the normal ankle of the plaintiff, but it may serve some purpose. I will overrule the objection.

Mr. TUCKER.—An exception.

A. I just simply want to show the line of the weight-bearing surface there. If you will draw this imaginary line from the center of the shaft of the large bone, you will notice it comes [36] in the center of the first bone of the foot and passes right on down through, through the center of the foot, showing that the weight there is amply sustained right in the center of that bone of the foot, which takes the weight from the leg, and in that way coming in the center, it of course forms a perfect formation for the weight; while in this one again, Mrs. Eichelbarger's, as you will notice I showed you, it comes away over to the side there, and the bone is tipped away off to an angle allowing the weight to come off to the side of the foot.

Mr. TURNER.—I offer these plates in evidence, if your Honor please.

The COURT.—They may be admitted.

Mr. TUCKER.—I object to plate number 2 as being incompetent, immaterial and irrelevant.

The COURT.—Objection overruled.

Mr. TUCKER.—An exception.

(X-Ray plates heretofore referred to marked Plaintiffs' Exhibit 1 and Plaintiffs' Exhibit 2.)

The WITNESS.—With the plaintiff's ankle in the condition it is in now it is impossible for her to use it in a normal manner. The deformity is permanent

(Testimony of J. H. Snively.)

and there would be no tendency to improvement. In fact, there will be a little tendency to wearing away of the joint if the weight were put on it until she will be walking almost on the inside of the foot. She will not be able to use that foot so as to put any weight on it. Any joint that has been as badly crushed and had torn ligaments and bones broken, as this you will get some limitation of motion, stiffness of the joint and a joint that would be very painful for a considerable length of time after the injury and then the soreness would gradually subside as the healing took place. I would imagine she would have more or less pain and rheumatism in that joint they usually do. If she tried to use it—put her weight on it, it would probably swell up and get sore and she would not be able to continue to use it. I just casually examined [37] her other foot—did not take any X-Ray of it. Having to use her injured foot in the manner I have described would tend to throw the weight on the other foot and compels her to use it in a different position by changing the angle of the body. This fracture is a very bad fracture and is what is called a Potts fracture. One that is very difficult to treat. Both bones broken and ligaments torn off round the ankle joint. You almost always have a permanent injury. There would be a limitation of motion in her ankle, as a result of the break. There would be just a little bit of shortening of the leg, as a result of the fracture; I would not say over a quarter of an inch—not enough to make any particular difference.

(Testimony of J. H. Snively.)

Cross-examination.

This Exhibit No. 2 is a plate of somebody's that I picked up in the office—I don't know whose. I have examined the left ankle of the plaintiff but not with an X-Ray. Just by looking at the two of them. I never saw her foot before the injury and I do not know whether she stood straight before the injury or not. There are people whose feet do not stand straight under their legs, because of flat feet, but I have taken a good many thousands of X-Rays of ankles and I do not remember of ever seeing any deformed ankle. The tibia, the large bone in the leg, is a little longer than it was before and the fibula, the short bone, is crushed and shattered and has shortened a little bit. There are operations that would improve the condition. Cutting off the tibia and putting the foot back in position and fastening it there and cutting the little *the little* bone off and fastening it down—if it were successful and there were no infection and a lot of other little things that might happen did not happen, you might run a little chance of getting a better foot. If it was done successfully that would improve it in some respects. I did not see the ankle until about a year after it was broken. The injury is such that it would be very difficult to get the bones back into position and put the foot straight in line.

Testimony of D. F. Bice, for Plaintiff.

D. F. BICE, called as a witness on behalf of the [38] plaintiff, being first duly sworn, testified as follows:

(Testimony of D. F. Bice.)

"I am a physician and surgeon (defense admitted qualifications). I treated the plaintiff, Mrs. Eichelbarger, in June, 1917. About June 21st, 1917, near midnight, I was called to one of the hotels to see the plaintiff and found upon examination that a Potts fracture had been sustained. I first reduced the fracture and applied splints, because of the possibility of swelling and injury to the tissue if I were to put on a cast at the time. Later, I think, about two days, I removed the splints and put on a wire cast. She was under my treatment for about two months. I continued to see her for six or eight weeks, and then later once or twice. I removed the cast. At that time I found the ankle in apparently straight position; that is, the foot straight in line with the tibia and the fractured part in apparent apposition to the bone above. I told her it was crushed and to especially avoid bearing any weight on it, as long as there was any pain, up to around three months. I removed the cast the latter part of August, and if I recall correctly, put on an adhesive strap to support the ankle and foot. The treatment which I gave is the approved and proper treatment for that sort of injury. I have to-day seen the X-Ray plates that were taken and have also again examined Mrs. Eichelbarger's ankle. The condition shown by the X-Ray plates and my examination is the result of the injury. The fact that a better result was not obtained is due, I believe, to the laceration of the ligaments of the ankle. The fracture was not difficult to reduce, but from studying the X-Ray

(Testimony of D. F. Bice.)

plates to-day, I would say that the location of the fracture was of such a nature that a good result could not be expected. The injury is permanent. She cannot use the ankle in a normal manner. Mr. [39] Sands asked me to treat the plaintiff. My bill was paid by the Al. G. Barnes Circus Co.

Cross-examination.

"As a matter of fact, Mr. Riggs paid me the bill and I don't know who paid it to him. I was paid by Mr. Rigg's check. The cast was taken off about two months after the fracture—I think it was the 20th or 21st of August. At the time I took it off it seemed to have produced a good result. I think I saw it twice after that. The last time that I saw it there was no change in the result, so far as I could see. I would not remember if there were any such change—at the time I saw her, about a month after I took the cast off, I thought I had a good result and discharged her as such. The condition in which the foot now is could be partly remedied. The extent of the improvement is questionable, but I feel that her ankle can be improved by surgical treatment. I would say there would be about 75% improvement, so that her limb would only be deteriorated 25%. The only danger there would be in having her undergo that treatment would be from the standpoint of infection, and if properly done by a surgeon that knows his business, the percentage of that risk is imperceptible."

Redirect Examination.

"I would, myself, in her condition undergo the

(Testimony of D. F. Bice.)

operation and I believe that a surgeon could assure the patient that she would get an improvement—the question is as to the extent of it. With the best results, it should be very nearly normal. I don't remember whether I gave her any instruction for a brace after I finished the treatment, although I think I might have; I sometimes do. The object of such treatment would be to take the strain from the ligaments joining the leg and foot bones and support them until the union had been more perfect from the ligament standpoint, because the [40] union of ligaments is slower than the union of bones. The operation I spoke of would incapacitate the patient for some weeks and entail quite a little expense."

Recross-examination.

"I think a good orthopedic surgeon would take from $250.00 to $350.00 for the work. It would take eight weeks to insure a good result and perhaps a little more for convalescence. Hospital, nurse and expenses would be $50.00 a week. She would be required to be at the hospital fully six weeks, which would amount to $300.00—six weeks more in a convalescent stage, during which she would not be required to be in the hospital but would be incapacitated. I would feel confident of getting good results—that is, she would have a more usable leg—would not need to walk with a cane or crutch. She might not limp after six to twelve months. I don't believe she would but cannot be sure about that."

Testimony of Lewis R. Dawson, for Plaintiff.

LEWIS R. DAWSON, called as a witness for the plaintiff, being first duly sworn, testified as follows:

"I am a physician and surgeon, practising in Seattle a great many years. I saw Mrs. Eichelbarger on the 13th of June, 1918. I saw the plates on the 16th of December, but I don't think I saw her again until today. I am not positive as to whether I saw her on the 16th of December or not. The plates were taken at my suggestion by Dr. Snively and I have examined them. When I examined her in June, 1918, the condition was practically the same as now; I couldn't see that it was any worse, but practically the same. Potts fractures are regarded as one of the most uncertain fractures to treat. Any fracture in which the bone is broken in connection with the joint is much harder to treat than when it is elsewhere, the difficulty being that in any Potts [41] fracture you have not only the break of the bone, but the tearing of the ligaments, and this particular fracture is a harder one than usual to treat. On account of the fact that she cannot bear much weight on the right foot, she has to bear most of it on the left and her crutch or cane and it brings an unnatural strain on that and to a certain extent an unnatural position, so that it would keep the left ankle irritated and weak. There is an unnatural callous on the inside of the left foot, due to the fact that it was put in an unnatural position in walking. The fact that she cannot use the limb freely without pain, would naturally effect her general nervous condition. She

(Testimony of Lewis R. Dawson.)

would be better off to have her foot taken off entirely and use an artificial foot than she is now. With her limb in its present condition, it is impractical for her to do heavy work, like day work in houses. It may gradually improve and she may have less pain, but on the other hand it may get worse and she may have even more, but leaving aside the question of an operation, she is permanently disabled. Operations on joints are notoriously uncertain because you are liable to have infection, or the movement of the joint is liable to be impaired, but in her case, I think an operation is preferable to going without it, because even if she got nothing better than a stiff joint, if she could bear her weight on it without pain, she would be better off than she is now. I heard Dr. Bice's testimony and I don't think it is possible that she could get such results that she would absolutely have no disability. I believe the best we could hope for would be a very decided improvement. If she had an operation by the best surgeon I would hope that the foot would be so that she would be able to bear her weight on it without pain. That would be a matter of months, probably a year or more, before she would be able to walk without pain and soreness. She would always be a cripple to some extent in that ankle and never have a perfect ankle. The expenses of a surgeon, hospital and other expenses for such operation would be somewhere between $500 and $1,000—[42] it would probably be more than $500.00. Any competent man would probably charge in the neighborhood of $300 for the

(Testimony of Lewis R. Dawson.)

operation and she would be entirely disabled from the operation three months and probably longer, and I don't believe it would be normal so far as normal use would be restored in less than six to nine months, or possibly a year. I have not been treating Mrs. Eichelbarger or prescribing for her. I was just asked to examine her and report on her condition. I did not advise her to have the operation that has been spoken of.

Testimony of J. F. Eichelbarger, for Plaintiff.

J. F. EICHELBARGER, being first duly sworn, as a witness on behalf of the plaintiff, testified as follows:

I am the brother of the plaintiff, Stanley Eichelbarger. I went with Mrs. Eichelbarger to the Barnes Circus at Toppenish. I paid for her admission. A young fellow from the circus directed us up to seats and we all went up the way he directed us. As we got within two rows of the top my sister-in-law stepped on a board and then it broke through. I made a clutch for her, being right behind her, and caught her under the arm and we both fell through. Nobody was standing on the seat near her at the time. One of the boards that broke fell down on one side, cutting my arm and going into the ground for about a foot. The seats were just laid on steps, one above the other, going clear around the tent. There were no aisles or other places to walk up—they had a man there to show you and they walked

(Testimony of J. F. Eichelbarger.)

right up across the seats; everybody did that at the direction of the attendants.

Cross-examination.

There were six of us, the plaintiff right ahead of me; I don't know who was ahead of her; I saw the board after it was broken. I did not examine the board as to whether there was anything wrong with it, but from the way the board split I should judge it was not a perfect board. It seemed otherwise to be a perfectly good board and broke right through. There was not a thing that would indicate to anybody of average perception [43] that it was not safe to walk on. My judgment would have been that it was just as safe as any of the other boards there to walk on."

Redirect Examination.

"I did not examine the board in particular, nothing only the depth in the ground."

Recross-examination.

"I should judge the board was about 6 or 8 or maybe 10 inches wide, something in excess of 1 inch thick, I know that. It was a painted board. It was not oak or hickory or ash; it must have been some light board because it broke with the grain the length of the board; instead of breaking crossways it broke slanting. I should judge the sliver ran down into the ground about a foot and that the board broke about that distance. The bents, I should say, from measuring the seats in Seattle were 12 feet apart.

(Testimony of Stanley Eichelbarger.)

The one that broke was no longer than any of the rest''

It is now stipulated between the parties plaintiff and defendant in open court that the allegations contained in the fourth paragraph of the complaint about the going rate of wages is admitted by the defendants.

Testimony of Stanley Eichelbarger, in His Own Behalf.

STANLEY EICHELBARGER, one of the plaintiffs, being first duly sworn, testified as follows:

''I am the husband of Mrs. Etta Eichelbarger, and one of the plaintiffs; have been married thirteen years. I was not present at the time she was hurt. Prior to that time her health was good and she was doing day work at private houses since 1914, averaging about five days a week. Since the injury the only work she has been able to do is take care of children or something; light work that she can sit down to do. She was troubled since then with sleeplessness at times and been bothered a good deal with pains in her ankle, hip and the back of her head. Prior to the injury she never had any trouble such as sleeplessness or nervousness.''

Thereupon the plaintiffs rested.

Thereupon counsel for the defense moved that judgment be entered in favor of the defendant, Al. G. Barnes, on the ground [44] that there was no evidence tending to show that said Al. G. Barnes was in any way liable for the injury suffered, and in the

alternative moved for a judgment of nonsuit in favor of the defendant, Al. G. Barnes, on the ground that there was no evidence tending to connect the said defendant with the accident.

Both of said motions were by the Court overruled, to which act of the Court the defendant, by his counsel, then and there excepted.

Thereupon the defendants, through their counsel, challenged the sufficiency of the evidence and moved for a judgment of dismissal on the ground, and for the reason, that there was no evidence tending to show any negligence, or want of performance of any duty, owing by the defendants to the plaintiffs; and for a judgment of nonsuit on behalf of defendants.

Said motion was overruled, to which ruling of the Court the defendants, by their counsel, then and there duly excepted. In the overruling of said motion, the jury being present, the Court made the following remarks:

"The jury being present, will understand that anything I say about my conclusion on the facts is not at all binding on them. You are called here to determine the facts in this case and any intimations that I give in ruling on this matter or about what I conclude on the facts, [45] if I do say anything about it, you will disregard. I am simply denying this motion, which leaves these questions of fact to you for your determination, and not concluding it in any way. But the attraction of gravitation is so uniform in its operation that it appears to me that the very fact that this board broke while the plaintiff was walking up those steps on these boards in the

ordinary way—we know that women, especially at her age and of her size, do not mount and jump as young fellows do, but that the board evidently was not subjected to any extraordinary strain other than the strain that could be put upon it by weight. That is, she did not do anything out of the ordinary, like anyone coming down the steps might have jumped from one board to another and put some great strain on it. It would not be altogether unreasonable to conclude from the mere fact that weighing 190 or 195 pounds, and the fact that the girls or women that were ahead of her did not fall, shows they had got off of the board, and Mr. Eichelbarger has explained how he was pulled into this by grabbing at her and trying to save her. He was not on the board. She was on the board and it is not unreasonable to conclude that the board broke under her weight of 190 or 195 pounds. Now, from what Mr. Eichelbarger has disclosed about the appearance of the board it might not be unreasonable to conclude that no test had been made of that board under a weight equal to hers, where it would have broken under the test, and her weight is not so extraordinary but what any reasonable person handling big shows and enormous crowds might well [46] anticipate that greater weight than hers would be at some time put upon the board either by two or more people hurrying up the steps to get seats or by some person of greater weight than hers stepping upon the board. But one matter that has not been mentioned makes it not absolutely necessary to invoke the doctrine of *res ipsa loquitur*. This witness says that board broke with

the grain; that is, it did not break across the grain. He says that one point of the board ran down into the ground. It is not unreasonable to conclude that that was a cross-grained board and that the cross-grain was concealed by the paint which the show company had put on the board for the sake of the appearance of the board, and when they painted it they could see it was cross-grained, even though they might not have seen it after they covered it with the paint. Motion denied.

Mr. TUCKER.—Allow an exception.

The COURT.—Allowed. Proceed with the defense.

Mr. TUCKER.—We rest.

The COURT.—Go to the jury.

ARGUMENTS TO THE JURY BY RESPECTIVE COUNSEL. [47]

Thereupon the Court instructed the jury as follows:

Instructions of Court to the Jury.

The COURT.—Gentlemen, you have had the case very frankly explained to you by counsel on both sides. You will take the complaint out with you and the pleadings in the case and have them with you in the jury-room, so that, if it is necessary to discover further what the issues are, you will have the pleadings there and can refer to them. Briefly the plaintiffs, that is, Mr. and Mrs. Eichelbarger, sue in this case on account of this injury that the plaintiff, Mrs. Eichelbarger, has sustained. In the course of my instructions I am liable to simply refer to Mrs. Eichelbarger as the plaintiff. The law requires that

where a married woman sues on account of an injury of this character it is necessary to join her husband with her in the suit.

The plaintiffs aver that these defendants are the owners of a circus, a traveling show, and that it gave a performance and appearance at Toppenish, and advertised and thereby invited people to attend it, and that the plaintiff, Mrs. Eichelbarger, went there and was shown by an usher of the defendants and directed to proceed up these seats and using them as a stairway or steps to a position at the back and above the ground, and that in going up there one of these seats or steps broke and she fell and hurt herself, and that the defendants were negligent in that that seat or step on which she was directed to walk was weak and defective, and the plaintiffs describe what injuries she sustained on [48] account of her fall when that plank or board broke. The defendants deny that they were at all negligent and deny the extent of the injuries set up in the complaint, and aver that the plaintiff herself was negligent in the manner in which she went up there and that that caused her injury. The plaintiffs then reply denying that she was in any way negligent. These are the issues you are called upon to try.

Under the circumstances disclosed by the pleadings and the evidence it was the duty of the defendants to exercise ordinary care to have safe and suitable seats or steps, if they were contemplating using the seats as steps, for the patrons of their show to walk up or back and up to secure seats high up on the bank of seats.

Ordinary care, as defined in this instruction and as applied to one later I will give regarding the plaintiff, Mrs. Eichelbarger, means the care that a person would ordinarily exercise under the same circumstances and should always be proportionate to the peril and danger reasonably to be apprehended from a want of proper prudence. Now, you will take all of the circumstances and the situation and what might reasonably be expected into account in determining what perils and danger were reasonably to be apprehended from a want of proper prudence in furnishing a safe and suitable board or plank for such use as this one was to be subjected to and might be expected to be subjected to. Failure to exercise ordinary care would constitute negligence, as I have said to you.

The burden of showing by a fair preponderance of [49] the evidence negligence on the part of the defendants and the extent of injury and damage on account thereof rests upon the plaintiffs, and unless they have shown by a fair preponderance of the evidence the sum of the negligence of which they complain on the part of the defendants, they can't recover.

The defendants in their answer having set up that the plaintiff was herself negligent, that is, that she failed to exercise ordinary care, and that that negligence on her part contributed to her injury, the burden of establishing by a fair preponderance of the evidence negligence upon her part rests upon the defendants unless she herself has shown it by her own evidence. The rule is that the plaintiffs could

not recover, no matter how negligent the defendants were, if the negligence of the plaintiff, Mrs. Eichelbarger, contributed to her injury. She herself was bound to exercise ordinary care, even though directed by the usher in proceeding to take her seat in the manner he directed in the circus, and if she failed to exercise ordinary care for her own safety under all the circumstances, and that failure on her part to exercise ordinary care contributed to and helped to cause her injury, and without such negligence on her part she would not have been injured, then the plaintiffs cannot recover even though the defendants were negligent as complained.

Logically in taking up the issues as made by these pleadings you would first dispose of this question about whether she was guilty of any want of ordinary [50] care which contributed to her injury. If you find by a fair preponderance of the evidence that she was, why, then you need not go any further; you would return a verdict for the defendants because of the fact that the plaintiffs had been barred from recovery by her contributory negligence. If you find that there is no preponderance of the evidence showing that she was guilty of contributory negligence which contributed to her injury, you would then go on and determine whether the defendants were shown to be negligent in the particular of which complaint is made. If there is no fair preponderance of the evidence to show that they were negligent in any of those matters, why, then you would stop in your deliberations and return a verdict for the defendants. But if you can find that the preponderance of the

evidence was, and if it is shown by a fair preponderance of the evidence that the defendants were guilty of negligence which caused her injury, why, then you would come to the last step in the case and determine the amount at which you would fix the recovery that should be allowed the plaintiffs. If you reach this stage in the case, as counsel fairly argued to you, you will, uninfluenced by any passion or prejudice against the defendants or any sympathy for the plaintiffs, allow such an amount as in the exercise of your best discretion will fairly compensate the plaintiffs for the injury which the plaintiff, Mrs. Eichelbarger, has suffered. It is perfectly proper for you to take into account any loss of time that directly resulted from this, any impaired earning capacity as the direct [51] result of the injury received at that time, the expense and nursing, if any there is shown or suffered, but you should have no intention, or not attempt in any way to punish the defendants. Your province is to, in a monetary way, compensate the plaintiff, Mrs. Eichelbarger, for the direct result of her injury, received through the negligence of the defendants, if such negligence has been shown and such injury has been shown—* * * you will disregard the Court's instructions about making any allowance up to date for doctors and nurses, because the amounts are not shown. * * *

The Court here instructed the jury as to the meaning of preponderance of the evidence, and upon the subject of the credibility of witnesses and then continued:

"Certain written instructions have been requested

that I will read to you. To some extent they repeat in substance a part of what I have already told you. You will not conclude from the fact that they are a repetition that the Court deems the repeated portion more important than any other part of the instructions. It is simply because it happens that way and the Court is trying to cover the whole case and that is all.

"I instruct you that it is the duty of one conducting a show or circus, to which the public is invited, upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such character that if used in the ordinary manner, persons so using them will not be injured; and if in this case you find that the defendants failed to exercise such care, but, on the contrary, negligently [52] provided a weak or defective seat upon which the plaintiff, Etta Eichelbarger, either by direction of the defendants or their employees having charge of directing guests where to go upon entering the said show or circus or in the use of the said seat for the purpose for which it was provided and intended to be used, stepped upon the said seat, and that the same broke and injured the plaintiff, Etta Eichelbarger, then the plaintiff in this case will be entitled to recover a verdict against the defendants, unless you find that the said Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of such injury.

If, under the instructions of the Court, you find a verdict for the plaintiffs, the amount of your ver-

dict should be such amount as you find under the evidence to be the actual financial loss to the plaintiffs, both past and reasonably certain future loss, on account of the loss, if any, of the earning power of the plaintiff Etta Eichelbarger by reason of such injury, and such additional sum as you find from the evidence to be reasonable compensation to the plaintiff Etta Eichelbarger for such suffering and discomfort as may have been and will, with reasonable certainty, in the future be occasioned to her by said injury.

I instruct you that one who has been injured by the negligence of another and who has been treated by a reputable physician and discharged after completion of such treatment and who has followed the instructions of such physician as to the care of the injury is not [53] required to seek other treatment for the said injury unless and until such time when such facts are brought to the attention of the injured person as would convince a person of reasonable prudence that further treatment is necessary and until such time such person, if entitled to recover damages for such injury, could recover the full measure thereof for actual loss and suffering during such time, even though it should appear that by other treatment the injury might have been minimized or lessened at an earlier date.

You are instructed that it was the duty of the defendant Al. G. Barnes Show Co. in providing seats for its patrons to use ordinary care, by that I mean such care as an ordinarily prudent person would exercise in and about such a business.

The defendant Al. G. Barnes Show Co. was not required to use extraordinary care, prudence and foresight, but only ordinary care, about which I have heretofore instructed you.

If you believe from the evidence that the defendant Al. G. Barnes Show Co. used ordinary care in the selection of the material from which it constructed the seats used at the time in question, and that there were no apparent defects in the seat that broke which, in the exercise of reasonable care and caution, the said defendant should or might have discovered, and that the said accident and injury to the said plaintiff was caused by some latent and hidden defect which the said defendant, in the exercise of ordinary care, prudence and caution, could not have discovered, then [54] and in that event your verdict should be for the defendant. It is not enough for you to find that the seat broke and precipitated the plaintiff Mrs. Eichelbarger, to the ground below, thereby causing her injury, but you must go further and find that the defendant the Al. G. Barnes Show Company has been guilty of negligence; and that said defendant did not exercise that degree of care and caution as is ordinarily and customarily used by other men in carrying on and conducting a like business; but the facts and circumstances under which the board broke may be taken into consideration by you in determining whether or not an ordinarily careful inspection of the board would have disclosed some defect in it or weakness.

Mr. TUCKER (for the Defendants).—"I think my points have been covered, the points I have raised

so far, but for the sake of the record I would like an exception to instruction number one as requested by the plaintiff that your Honor read first, and defendants except to instruction number three as requested by the plaintiff and given by the Court and defendants except to instruction number four as requested by the plaintiff and given by the Court."

The COURT.—* * * Exception allowed where requested instructions were refused. Regarding other instructions I think the exceptions are too general.

The instructions referred to by Mr. Tucker are found in this bill of exceptions as follows:

I instruct you that it is the duty of one conducting a show or circus to which the public is invited, upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such character that if used in the ordinary manner, persons so using them will not be injured; and if in this case you find the defendants failed to exercise such care, but, on the contrary, negligently provided a weak or defective seat upon which the plaintiff Etta Eichelbarger, either by the direction of the defendants or their employees having [55] charge of conducting guests where to go upon entering the said show or circus, or in the use of the said seat for the purpose for which it was intended or provided to be used, stepped upon the said seat, and that the same broke and injured the plaintiff Etta Eichelbarger, then the plaintiff in this case will be entitled to recover a verdict against the

defendants, unless you find that the said defendant Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of such injury.

I instruct you that one who has been injured by the negligence of another and who has been treated by a reputable physician and discharged after completion of such treatment and who has followed the instructions of such physician as to the care of the injury is not required to seek other treatment for such injury unless and until such time when facts are brought to the attention of the injured person as would convince a person of reasonable prudence that further treatment is necessary and until such time such person, if entitled to recover damages for such injury, could recover the full measure thereof for actual loss and suffering during such time, even though it should appear that by other treatment the injury might have been minimized or lessened at an earlier date.

You are instructed that it was the duty of the defendant Al. G. Barnes Show Company in providing seats for its patrons to use ordinary care; by that I mean such care as an ordinarily prudent man would exercise in and about such a business.

Thereupon the jury retired to consider of their verdict and thereafter and upon the same day returned and rendered their verdict in words and figures following, to wit:

"We the jury in the above-entitled cause find for the plaintiffs and assess their damages at the sum of $5,000.00."

Thereafter the defendants duly filed in writing their motion for a new trial herein, which said motion came on for hearing on the 5th day of April, 1920, and whereupon, the same having [56] been duly considered by the Court, was overruled, to which order of the Court the defendants by their counsel then and there duly excepted.

AND NOW, in furtherance of justice and that right may be done, the said defendants Al. G. Barnes Show Company and Al. G. Barnes tender and present to the Court the foregoing bill of exceptions in the above-entitled cause and pray that the same may be settled and allowed, signed *as* sealed by the Court and made a part of the record in the case.

TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.

Service of copy hereof acknowledged this 3d day of May, 1920.

CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs. [57]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Settling Bill of Exceptions.

The defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, having tendered and presented the foregoing as their bill of exceptions in this cause to the Court, in furtherance of justice and that right may be done them, and having prayed that the same may be settled, allowed, signed and sealed by the Court, and made a part of the record herein, and the Court having considered said bill of exceptions, and all objections and proposed amendments made therein, and being fully advised, does now sign, settle, seal and allow said bill of exceptions in this cause, and does order that the same be made a part of the records herein.

The Court further certifies that each and all of the exceptions taken by the defendants, as shown in said bill of exceptions, were at the time the same were taken allowed by the Court.

The Court further certifies that said bill of exceptions contains all the material matters and evidence material to each and every assignment of error made by the defendants and tendered and filed in this cause with said bill of exceptions.

The Court further certifies that said bill of exceptions was filed and presented to the Court within the time [58] provided by law.

The Court further certifies that the instructions set forth in said bill of exceptions were given by the Court over the exceptions of the defendants, as shown by the said bill of exceptions and that no other instructions were given by the Court other than the matters contained in said bill of exceptions and that said bill of exceptions shows all of the exceptions taken by said defendants to said instructions.

The Court further certifies that exhibits 1 and 2 forwarded with this bill of exceptions are the exhibits and the only exhibits offered at the trial of said cause.

Done in open court, counsel for the plaintiffs and the defendants being present and consenting thereto, this 7th day of July, 1920, at Seattle, in said District.

EDWARD E. CUSHMAN. [Seal]
Judge.

O. K.—TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.
CHARLES H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiffs.

[Indorsed]: Bill of Exceptions and Order Allowing Same. Filed in the United States District Court, Western District of Washington, Northern Division. July 7, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [59]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Petition for Writ of Error.

To the Honorable, the Judges of Said Court:

Come now the above-named defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, and respectfully show that on the 30th day of January, 1920, the jury empaneled in said cause found a verdict in favor of the plaintiffs and against these defendants in the sum of Five Thousand Dollars and that thereafter a motion for a new trial by these defendants was overruled, and that on the 5th day of April, 1920, a judgment was entered in favor of said plaintiffs and against these defendants in the sum of Five Thousand Dollars, together with costs.

And your petitioners feeling themselves aggrieved by said verdict and judgment as aforesaid and by the record, orders and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States and in accordance with the procedure of said Court to the end that said proceedings as hereinbefore recited may be reviewed, and that the errors appearing upon the face of the record of said proceedings and upon the trial of said cause may be reviewed and corrected by the said Circuit Court of Appeals and that for said purpose a writ of error and citation [60] issue herein as by law provided, and that pending the final determination of said writ that the same may operate as a supersedeas.

Your petitioners present herewith and file an assignment of errors and a bond in the sum heretofore fixed by the Court as a supersedeas bond.

RIGG & VENABLES,
TUCKER & HYLAND,
Attorneys for Defendants.

[Indorsed]: Petition for Writ of Error. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [61]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Allowing Writ of Error and Making Same Supersedeas.

The defendants, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, having duly filed herein their petition praying for a writ of error to the Circuit Court of Appeals of the United States for the Ninth Circuit, together with their assignment of errors and their bond in the sum heretofore fixed by the Court as a bond on writ of error and as a supersedeas bond,—

IT IS ORDERED that a writ of error is hereby granted from the judgment herein to the Circuit Court of Appeals for the Ninth Circuit and that the same operate as a supercedeas pending the final determination of said writ.

Entered in open court this 17th day of May, 1920.

EDWARD E. CUSHMAN,

Judge.

[Indorsed]: Order Allowing Writ of Error and Making Same Supersedeas. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [62]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Order Fixing Supersedeas Bond.

The amount of the bond on writ of error having been heretofore fixed in the sum of Two Hundred and Fifty ($250) Dollars, and the defendants having moved the Court to fix an amount as a supersedeas bond, now, therefore,

IT IS ORDERED that upon filing a bond in the total sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars, properly conditioned as a bond on writ of error and supersedeas bond, that the same shall operate as such supersedeas bond and bond on writ of error.

Entered in open court this 17th day of May, 1920.

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Order Fixing Supersedeas Bond. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [63]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW CO., a Corporation, and AL. G. BARNES,

Defendants.

Bond.

KNOW ALL MEN BY THESE PRESENTS, that we, Al. G. Barnes Show Company, a corporation, and Al. G. Barnes, as principals, and Fidelity & Deposit Company of Maryland, a corporation, as surety, are held and firmly bound to Etta Eichelbarger and Stanley Eichelbarger, her husband, in the full sum of Six Thousand Two Hundred and Fifty ($6,250) Dollars, lawful money of the United States, for the payment of which we bind ourselves, our heirs,

executors, administrators and successors, jointly, severally and firmly, by these presents.

Dated this 14th day of May, A. D. 1920.

The condition of this obligation is such that whereas the said Etta Eichelbarger and Stanley Eichelbarger, her husband, did, on the 5th day of April, 1920, recover a judgment against the said defendants in the above-entitled court, and cause in the sum of Five Thousand ($5,000) Dollars, and costs, and whereas the said defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes are about to sue out a writ of error in the Circuit Court of Appeals of the United States for the Ninth Circuit to review the said judgment, and which said writ of error will operate as a supersedeas,—

NOW, THEREFORE, if the above-bounden Al. G. Barnes Show Co., a corporation, and Al. G. Barnes shall pay the said judgment [64] together with interest and costs if the same be affirmed by said Circuit Court of appeals or if said writ of error is dismissed, together with any costs that may be taxed against them in said Court, and shall pay any judgment that may be rendered against them in said cause in said Circuit Court of Appeals or shall secure a reversal of said judgment, then this obligation to be void; otherwise to remain in full force and effect.

AL. G. BARNES SHOW CO.
AL. G. BARNES.
By RIGG & VENABLES,
TUCKER & HYLAND,
Its Attorneys.

FIDELITY AND DEPOSIT COMPANY OF MARYLAND.

[Seal] Attest: J. BAIRD,
Agent.

By A. W. WHALLEY,
Attorney in Fact.

Approved:

EDWARD E. CUSHMAN,
Judge.

[Indorsed]: Bond. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [65]

In the District Court of the United States, for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Defendants.

Assignment of Errors.

Come now the defendants Al. G. Barnes Show Company, a corporation, and Al. G. Barnes and in connection with their writ of error filed herewith assign the following errors which the defendants aver and say occurred in the proceedings and at the trial

of the above-entitled cause in said court and upon which they rely to reverse and correct the judgment entered herein, and said defendants say that there is manifest error in said record in this:

1. The Court erred in admitting in evidence Plaintiffs' Exhibit 2, to the introduction of which these defendants objected and to the overruling of which objection the defendants then and there duly excepted.

2. The Court erred in overruling the motion of the defendant Al. G. Barnes for a directed verdict, to which action of the court these defendants then and there duly excepted.

3. The Court erred in overruling the motion of the defendant Al. G. Barnes for a judgment of nonsuit, to which action of the Court the defendants then and there duly excepted.

4. The Court erred in overruling the motion of these defendants for a directed verdict or in the alternative for a judgment of nonsuit, to which action of the Court the defendants then and there [66] duly excepted.

5. The Court erred in instructing the jury as follows: "But the facts and circumstances under which the seat broke must be taken into consideration by you in determining whether an ordinarily careful inspection of the board would have disclosed some defect in it." To which instruction of the Court the said defendants then and there duly excepted.

6. The Court erred in instructing the jury as follows: "I instruct you that it is the duty of one conducting a show or circus, to which the public is in-

vited upon the payment of an admission fee, to use ordinary care to see that such seats or other conveniences as are provided to be used by those attending such show or circus are safe and of such a character that if used in the ordinary manner, the person so using them will not be injured, and if in this case you find that the defendants failed to exercise such care, but on the contrary find that they negligently provided a weak or defective seat upon which the plaintiff either by direction of the defendants or their employees having charge of directing guests where to go upon entering said show or circus or in the use of said seats for the purpose for which it is provided or intended to be used stepped upon the said seat and that the same broke and injured the plaintiff Etta Eichelbarger, then the plaintiff in this cause will be entitled to recover a verdict against the defendants, unless you find that said Etta Eichelbarger was herself negligent and that such negligence was a contributing cause of the injury." To the giving of said instruction the defendants then and there duly excepted.

7. The Court erred in overruling the motion of these defendants to set aside the verdict of the jury and grant a new trial herein, to which ruling of the Court the defendants then and there duly excepted.

8. The Court erred in entering judgment in favor of the [67] plaintiffs and against the defendants.

And as to each and every of the said assignments of error the defendants say that at the time of the making of the order or ruling assigned as error the defendants at the said time asked and were allowed

an exception to the said ruling or order.

TUCKER & HYLAND,
RIGG & VENABLES,
Attorneys for Defendants.

[Indorsed]: Assignment of Errors. Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [68]

United States District Court, Western District of Washington.

No. 4735.

ETTA EICHELBARGER, et vir.,
Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, et al.,
Defendants.

Praecipe for Transcript of Record.

To the Clerk of the Above-entitled Court:

You will prepare transcript of record for C. C. A. containing summons, complaint as amended, petition bond and order on removal, order striking from complaint and stipulation, answer, reply, motion new trial and order denying same, docket entry lodging bill of exceptions, verdict, judgment, bill of exceptions and order allowing, petition for writ of error, order fixing bond, bond, assignment of errors, writ and citation.

TUCKER & HYLAND.
RIGG & VENABLES.

We waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

TUCKER & HYLAND,
RIGG & VENABLES,
Attys. for Pltffs. in Error.

[Indorsed]: Praecipe for Transcript of Record. Filed in the United States District Court, Western District of Washington, Northern Division. June 1, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [69]

United States District Court, Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court, for the Western District of Washing-

ton, do hereby certify this typewritten transcript of record consisting of pages numbered from 1 to 69, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to said writ of error herein from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiffs in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the [70] above-entitled cause, to wit:

Clerk's fee (Sec. 828, R. S. U. S.), for making record, certificate or return, 154 folios at 15c	$23.10
Certificate of Clerk to transcript of record—4 folios at 15c	.60
Seal to said Certificate	.20

I hereby certify that the above cost for preparing and certifying record amounting to $23.90 has been paid to me by attorneys for plaintiffs in error.

I further certify that I hereto attach and herewith transmit the original writ of error and original citation issued in this cause.

IN WITNESS WHEREOF I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 9th day of July, 1920.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court. [71]

In the United States Circuit Court of Appeals for the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,
Plaintiffs in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,
Defendants in Error.

Writ of Error.

The United States of America,—ss.

The President of the United States of America to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said Distirct Court before the Honorable Edward E. Cushman, one of you, between Al. G. Barnes Show Company, a corporation and Al. G. Barnes, the plaintiffs in error, and Etta Eichelbarger and Stanley Eichelbarger, her husband, defendants in error, a manifest error hath happened to the prejudice and great damage of the plaintiffs in error as

by their complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the records and proceedings with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit at the City of San Francisco, in the State of California, so that you have the same at the said City of San Francisco within thirty days from the date hereof in the said Circuit Court of Appeals to be then and there held, that the records and proceedings aforesaid then and there being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States of America should be done in the premises.

WITNESS the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this 14th day of May, A. D. 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal] F. M. HARSHBERGER,
Clerk of the United States District Court for the Western District of Washington.

Service of the foregoing writ of error and receipt of a copy admitted this 17th day of May, 1920.

PRESTON, THORGRIMSON & TURNER,
CHAS. H. HARTGE,
Attorneys for Plaintiff. [72]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [73]

In the United States Circuit Court of Appeals for the Ninth Circuit.

AL. G. BARNES SHOW COMPANY, a Corporation, and AL. G. BARNES,

Plaintiffs in Error,

vs.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Defendants in Error.

Citation on Writ of Error.

United States of America—ss.

The President of the United States of America to Etta Eichelbarger and Stanley Eichelbarger and Charles A. Hartge and Preston, Thorgrimson & Turner, Their Attorneys, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein the said Al. G. Barnes Show Company, a corporation, and Al. G. Barnes are plaintiffs in error and Etta Eichelbarger and Stanley Eichel-

barger, her husband, are defendants in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington this 17th day of May, 1920.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington.

Service of the foregoing Citation and receipt of a copy hereof admitted this 17th day of May, 1920.

CHAS. H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Defendants in Error. [74]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 17, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [75]

[Endorsed]: No. 3521. United States Circuit Court of Appeals for the Ninth Circuit. Al. G. Barnes Show Company, a Corporation, and Al. G. Barnes, Plaintiffs in Error, vs. Etta Eichelbarger and Stanley Eichelbarger, Her Husband, Defendants in Error. Transcript of Record. Upon Writ of

Error to the United States District Court of the Western District of Washington, Northern Division.

Filed July 12, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 4735.

ETTA EICHELBARGER and STANLEY EICHELBARGER, Her Husband,

Plaintiffs,

vs.

AL. G. BARNES SHOW COMPANY, a Corporation, and Al. G. BARNES,

Defendants.

Order Extending Time to and Including July 16, 1920, to File Record and Docket Cause.

For good cause now shown, IT IS ORDERED, that the time for filing the record in the above-entitled cause in the Circuit Court of Appeals be and the same hereby is extended for thirty days from this date.

Entered in open court this 16th day of June, 1920.

EDWARD E. CUSHMAN,
Judge.

O. K.—CHAS. H. HARTGE,
PRESTON, THORGRIMSON & TURNER,
Attorneys for Plaintiff.
RIGG & VENABLES,
TUCKER & HYLAND,
Attorneys for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1920. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

No. 3521. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of Rule 16 Enlarging Time to and Including July 16, 1920, to File Record and Docket Cause. Filed Jul. 12, 1920. F. D. Monckton, Clerk.